Supreme Court, U.S.
FILED
APR 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1502

ECEE, INC., ET AL.,

*Petitioners,*

v.

FEDERAL POWER COMMISSION,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Regulations Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 5 |
| Conclusion | 8 |
| Certificate of Service | 9 |


## TABLE OF AUTHORITIES

### Cases


*John E. Moss, et al.* v. *F.P.C.*, 502 F.2d 461 (D. C. Cir. 1974), ..... U.S ....., decided March 3, 1976, No. 74-883 ..... 2


### Statutes


Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. §§ 717, *et seq.* ..... 2


### Federal Power Commission Opinions and Orders


Opinion No. 699 ..... 2, 4

Opinion No. 699-H ..... 2, 4

Opinion No. 699-I ..... 2, 4, 6

Order No. 455 ..... 7


### Miscellaneous


Sec. 2.56 of FPC General Policy and Interpretations (18 C.F.R. § 2.56) ..... 2, 3, 4, 6, 7, 8

Sec. 2.75 of FPC General Policy and Interpretations (18 C.F.R. § 2.75) ..... 2, 3

Sec. 2.75n of FPC General Policy and Interpretations (18 C.F.R. § 2.75n) ..... 3, 5, 6, 7, 8

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Ecee, Inc., Pinto, Inc. and Texas Production Company ("Petitioners") petition for a writ of certiorari to review the judgment entered in this case on February 17, 1976, by the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. C) has not as yet been published. The January 31, 1975, order of the Federal Power Commission ("Commission") denying Petitioners' motions for withdrawal of certificates of public convenience and necessity and dismissing their applications

for new certificates of public convenience and necessity (App. A) and the Commission's March 24, 1975, order denying rehearing (App. B) in the proceedings below have not been published.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1976 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)).

## QUESTION PRESENTED

Each Petitioner applied for a certificate of public convenience and necessity covering certain sales of gas to Sea Robin Pipeline Company ("Sea Robin") from the federal domain, offshore Louisiana, under Section 2.75 of the Commission's General Policy and Interpretations, the so-called "optional procedure."[1] While the order granting Petitioners' applications was on appeal by an intervenor to the Court of Appeals for the District of Columbia Circuit, Petitioners terminated the subject contracts, entered into new contracts with Sea Robin and applied for certificates under Section 2.56[2] at the nationwide rate for new sales of gas. The question presented is whether the Commission correctly interpreted Sections 2.75 and 2.56 in holding that Petitioners could not terminate sales under the optional

[1] *Optional Procedure for Certificating New Producer Sales of Natural Gas*, 48 FPC 218, *amended* and *rehearing denied*, 48 FPC 477, *rehearing denied*, 48 FPC 1002 (1972), *John E. Moss, et al.* v. *F.P.C.*, 502 F.2d 461 (D. C. Cir. 1974), ..... U.S. ....., decided March 3, 1976, No. 74-883.

[2] 18 C.F.R. § 2.56. The successive amendments to Section 2.56 pertinent to this case made in Commission Opinion Nos. 699, 699-H and 699-I, Commission Docket No. R-389-B, are set forth in App. E, F and G, respectively.



procedure and apply for certificates covering their new contracts at the nationwide rate because a "final order" within the meaning of Section 2.75n[3] had been issued on Petitioners' applications under the optional procedure.

## REGULATIONS INVOLVED

The pertinent provisions of Sections 2.56 and 2.75 of the Commission's General Policy and Interpretations, 18 C.F.R. §§ 2.56 and 2.75, are set out in App. G and H.

## STATEMENT OF THE CASE

In October 1972, Petitioners entered into gas sales contracts ("the 1972 Contracts") with United Gas Pipe Line Company (who simultaneously assigned the contracts to Sea Robin) at a base price of 35¢ per Mcf at 15.025 psia, covering Petitioners' share of gas to be produced from certain leases in areas offshore Louisiana. Petitioners filed applications for certificates of public convenience and necessity covering the 1972 Contracts in December 1972, under Section 2.75, *i.e.*, the optional procedure, and in February 1973, as authorized under the optional procedure, commenced sales of gas to Sea Robin.

The Commission issued its order granting Petitioners' applications at the 35¢ per Mcf base price in September 1973. A petition for judicial review was promptly lodged in the District of Columbia Court of Appeals by an intervenor in the proceedings, American Public Gas Association ("APGA"),[4] challenging the validity of the Commission's rate determination and the legality *per se* of its order.

[3] 18 C.F.R. § 2.75n. App. H.

[4] *APGA* v. *F.P.C.*, appeal docketed No. 74-1020, D.C. Cir., January 4, 1974. Appeal voluntarily dismissed July 24, 1975.

Petitioners expressly retained the right in the 1972 Contracts to terminate them at any time prior to the issuance by the Commission of final, *nonappealable* certificates covering sales under the 1972 Contracts. In June 1974, the Commission issued Opinion No. 699, establishing a uniform nationwide base rate for interstate sales of gas at 42¢ per Mcf at 14.73 psia. Since Petitioners' sales to Sea Robin commenced after January 1, 1973, *i.e.*, February 21, 1973, the sales were eligible for the nationwide rate under Section 2.56, as amended by Opinion No. 699.[5] Therefore, in November 1974, Petitioners terminated the 1972 Contracts and entered into new contracts with Sea Robin ("the 1974 Contracts") at the nationwide rate. On November 27, 1974, Petitoners filed (i) motions to withdraw their previous applications for certificates under the optional procedure and (ii) applications for certificates covering the 1974 Contracts under Section 2.56 at the nationwide rate. The Commission made no determination on Petitioners' motions and applications until January 31, 1975.

Meanwhile, the Commission issued Opinion Nos. 699-H and 699-I on December 4, 1974, and January 7, 1975, respectively, further amending Section 2.56.[6] Under Opinion No. 699-H, sales of gas which commenced after January 1, 1973, were still eligible for the nationwide rate (now increased to 50¢ per Mcf), but only if no certificate for the subject sale had been issued under the optional procedure. Opinion No. 699-I added the further condition that producers who had *applied* for certificates under the optional procedure for sales commenced after January 1, 1973, at an average contract price lower than the nationwide rate, were ineligible for the nationwide rate as to such sales regardless of whether or not a certificate had been issued. On January

[5] App. E.

[6] App. F and App. G.



31, 1975, the Commission issued an order denying Petitioners' motions to withdraw their previous applications under the optional procedure and dismissing their applications for certificates covering the 1974 Contracts at the nationwide rate.

The Court of Appeals for the Fifth Circuit affirmed the Commission's order.

## REASONS FOR GRANTING THE WRIT

Section 2.75n reserves to producers applying for certificates under the optional procedure the right to terminate deliveries under their contracts "... if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a *final order* upon review of such application ..." (Emphasis added). This important right reserved to producers should not be neutralized by the interpretation the Commission and the Court of Appeals have placed on the words "final order" in this case.

Certainty of contract rights, including price provisions, is as important to Petitioners as it is to other producers of natural gas. Petitioners carefully retained the right to terminate the 1972 Contracts at any time prior to the issuance of final, *nonappealable* certificates by the Commission and believed that Section 2.75n clearly afforded them the right to cease deliveries of gas to Sea Robin upon exercising such right. In denying Petitioners this right, however, the Commission held in the proceedings below that "final order" in Section 2.75n means merely an order that is not interlocutory, *i.e.*, an order ripe for judicial review. The words "final order" may certainly have this sense in other contexts, as illustrated in the cases and authorities cited by the Court of Appeals below, but they surely have the opposite, and more ordinary meaning of an order determining rights and issues with finality, in Section 2.75n.

This interpretation is made manifest in Section 2.75n(2) which provides that an applicant may terminate deliveries "... upon the issuance of a certificate containing conditions unacceptable ..." to him. The court proceedings initiated by APGA's petition for review *supra,* n. 4, might well have resulted in either a holding that the Commission was without authority to issue certificates pursuant to the optional certificate procedure or a remand to the Commission for further price proceedings and the subsequent issuance of certificates conditioned in a manner unacceptable to Petitioners. Had either of these contingencies occurred, Petitioners clearly would have had the right to terminate deliveries under Section 2.75n. Thus, under the interpretation of the words "final order" adopted by the Commission, Petitioners would have had the right to terminate deliveries of gas at any time prior to the issuance of an order by the Commission granting Petitioners' applications, at which time, however, that right would become "suspended," only to revive later if the case were remanded or the Commission's order otherwise overturned by the Court of Appeals.

It is eminently more reasonable to assume that the words "final order" in Section 2.75n are used in the ordinary sense of an order *finally determining* the rights and duties of the applicant as established in the certificate granted. Only when an order becomes final in this sense may the applicant know that a valid certificate has been issued and what conditions the certificate will ultimately contain. No order can be final in this sense while it is the subject of a pending judicial review.

If Petitioners' interpretation is correct, Petitioners' right to apply for the nationwide rate as to the 1974 Contracts under Section 2.56, as amenedd by Opinion No. 699-I, is clear. Petitioners' sales are "new" sales, having commenced after January 1, 1973, and are made pursuant to contracts entered into after January 1, 1973. Not only does this produce a more reasonable interpretation of Section 2.75n, and a more rational interplay between it and Section 2.56, it produces a more equitable result in this case.



The Court of Appeals addressed the question of "fairness" to Petitioners. Petitioners were offered the optional procedure as an alternative to the chaotic area rate proceedings[7] and the grossly unrealistic prices engendered by those proceedings. Having filed their application under the optional procedure, and without any certainty as to the final outcome pending the APGA appeal, Petitioners witnessed the establishment by the Commission of the comparatively enlightened nationwide base rate structure. Petitioners exercised their contractual right to terminate the 1972 Contracts and their apparent right to terminate deliveries under Section 2.75n, only to find the Commission arguing that they had elected the benefits of the optional procedure and should not escape its burdens.

The "benefits" to Petitioners are that they are being required to sell gas under terminated contracts at a price approximately 60% less than the nationwide rate found to be just and reasonable by the Commission for comparable sales. In contrast, Petitioners' co-owners of the leasehold interests in question, Exxon Company, Mobil Oil Company,

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[7] "It should be made clear that the optional procedure is not intended to supersede the procedures currently being followed in the *area rate proceedings.* The *area rate* opinions have established rate levels for new and flowing gas sales that are currently being made, and parties may continue to operate under these procedures. This is an alternative procedure which is available if the producer is willing to forego certain benefits of *area rate proceedings,* in exchange for *certainty* of its certificated price, as determined at the certificate stage." Order No. 455, issued August 3, 1972, promulgating the optional procedure. (Mimeo. p. 11) (Emphasis added)

Pennzoil Offshore Gas Operators, Inc. and Mesa Petroleum Company are all receiving in excess of 50¢ per Mcf for gas produced from the same wells as Petitioners' gas. This result is neither equitable nor necessary under Sections 2.75n and 2.56, and is in derogation of the public interest.

These Petitioners are relatively small independent producers who must primarily base their exploration and development efforts on internally generated funds. The action below of both the Commission and the Court of Appeals, in choosing to ignore the lack of finality of Petitioners' optional certificates, necessarily also ignores the need for higher prices to provide those funds necessary for efforts to help alleviate this nation's critical shortage of natural gas supply.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 15, 1976

*Of Counsel:*

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## CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Petition on the Respondent, Federal Power Commission, by depositing same in the United States mail, postage prepaid, addressed to counsel of record for the said Commission. I have also served a copy of said Petition on the Solicitor General, Department of Justice, by depositing a copy in the United States mail, postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530.

/s/ WILLIAM NEAL POWERS, JR.
William Neal Powers, Jr.